

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Submitted on Briefs, December 6, 2006

**CAROLYN JEAN GAMBLE and CAROLYN JEAN GAMBLE on behalf of
Deceased, GEORGE GAMBLE v. LENETTE PERRA, M.D., BAPTIST
HOSPICE, BAPTIST HOSPITAL OF EAST TENNESSEE, PIERCE
ALEXANDER, M.D., HILLCREST WEST ON MIDDLEBROOK PIKE,
CAROLYN SUE TOWNSEND, R.N., of HOSPICE, JAMES WORDEN,
DIRECTOR OF BAPTIST HOSPICE**

**Direct Appeal from the Circuit Court for Knox County
No. 1-575-05 Hon. Dale C. Workman, Circuit Judge**

No. E2006-00229-COA-R3-CV - FILED FEBRUARY 22, 2007

Plaintiff sued defendants alleging their negligence caused the wrongful death of her husband. The Trial Court granted defendants summary judgment on the grounds that plaintiff's responses did not raise any disputed issues of material fact. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Carolyn Gamble, Knoxville, Tennessee, *pro se*.

Wynne C. Hall and Joshua R. Walker, Knoxville, Tennessee, for appellee, Lenette Perra, M.D.
Gary G. Spangler and Zachariah N. Stansell, Knoxville, Tennessee, for appellees, Baptist Hospital of East Tennessee and Sue Townsend, R.N.

Debra A. Thompson, Knoxville, Tennessee, for appellee, Dr. Brian Hughes.

Stephen C. Daves and P. Alexander Vogel, Knoxville, Tennessee, for appellee, James Worden, M.D.
James H. London and Mark A. Castleberry, Knoxville, Tennessee, for appellee, Pierce Alexander, M.D.

OPINION

The plaintiff, Carolyn Jean Gamble, brought this action on her behalf, *pro se*, and also on behalf of the Estate of the Deceased, George Gamble, also *pro se*, alleging that Mr. Gamble died as a result of the negligence of the defendants, and also made allegations of fraud, misrepresentation and breach of contract.

Plaintiff alleged that defendant, Dr. Perra, recommended that her husband enter hospice care with the Baptist Hospital at Hillcrest West in Knoxville, and that her husband was admitted. She alleged that her husband could have lived longer, but for his lack of treatment by defendants. Plaintiff further alleged that her husband was admitted to Baptist Hospital from Hospice at 4:00 p.m. on October 21, 2004 with a diagnosis of pneumonia, which was left untreated, and he untimely died at 9:30 p.m. that evening. Further that he shouldn't have been admitted to the hospital's hospice floor, and that defendants Townsend and Perra breached their contract with her by allowing DNR Hospice orders to be put in her husband's record without her knowledge or permission. She alleged that she met with Dr. Alexander after her husband's death, and that he told her he put Mr. Gamble on Roxonal to "put him out of his misery", and the doctor added that "most people thank me for what I do". Plaintiff also attached to her Complaint her husband's hospice record. This record contains an account by Dr. Hughes, who reported that he went in at 9:30 to examine Mr. Gamble and noticed his breathing was very slow, and reported that he ordered Narcan and was going to attempt to administer the same, but Gamble died. He concluded that "because the patient was a hospice patient, no attempt to do a cardiopulmonary resuscitation was made."

Dr. Hughes' filed an Answer and denied any negligence or liability, but admitted that narcotics overdose was listed as a possible diagnosis on the discharge summary, and that he also noted that "because the patient was a hospice patient, no attempt to do a cardiopulmonary resuscitation was made." He also stated that he always acted within the recognized standard of care in his treatment of Mr. Gamble.

Dr. Hughes filed a Motion for Summary Judgment, asserting there was no genuine issue of material fact, and that the treatment he gave to the Decedent was consistent with the standard of care. Hughes attached his own Affidavit, wherein he stated that he was a licensed medicine hospitalist physician, that he had been practicing since 2001, and that he was board certified in internal medicine. He stated that based upon his education, training, and experience, he was familiar with the standard of care for internists practicing in Knoxville, and further, that he was of the opinion that CPR would have been futile, given Decedent's condition, and that the wife was present in the room at the time, and did not request that CPR be done. He concluded by stating that in his professional opinion, he had provided Decedent with care consistent with the standard of care in that

community, and did nothing to contribute to the patient's death.

At that juncture, the Trial Court dismissed James Worden, Medical Examiner for the Baptist Hospital, because the Complaint failed to state a claim.¹

Baptist Hospital of East Tennessee, Inc., also filed a Motion for Summary Judgment, attaching the Affidavit of Wanda Martin, RN. She stated that based upon her experience, she was familiar with the appropriate standard of care for nurses and hospitals in Knox County. Further that she had reviewed the records from Baptist, as well as Dr. Hughes' affidavit, and in her professional opinion Mr. Gamble received appropriate nursing and hospital care while at Baptist, and that appropriate nursing assessments were performed and documented, physician orders were duly noted and carried out, and appropriate and timely communication with the physician was made. She stated that Mr. Gamble received care that was consistent with the standard of care in that community.

Nurse Townsend filed a Motion for Summary Judgment, asserting there was no contract between her and the Gambles, that there was no DNR order in effect, and that all conversations she had with the plaintiff occurred more than a year prior to the filing of the lawsuit. She filed a Rule 56.03 Statement, which asserted that on October 21, 2004, neither decedent's hospice records nor his records from Hillcrest contained a DNR order. She further stated that she did not provide any care for Mr. Gamble, was not a party to any agreement with plaintiff, and that the care provided by hospice was appropriate and comported with the standard of care, and also stated that the hospice care did not contribute to the death.

Dr. Alexander filed a Motion for Summary Judgment, and an Affidavit. In his Affidavit, Dr. Alexander stated that he was an MD, board-certified in internal medicine, and that he practiced at Hillcrest West. Dr. Alexander stated that he was familiar with the standard of care for an internist practicing in a hospice in Knox County. Dr. Alexander stated that he had reviewed Mr. Gamble's medical records, and that Mr. Gamble was admitted to Hillcrest West on October 18, 2004, for decubitus wounds due to his immobility. Dr. Alexander testified that he got a call from the nurse who told him that Mr. Gamble needed pain medicine for his discomfort, so he prescribed Roxanol and MS Contin. Dr. Alexander testified that later that day, he personally examined Mr. Gamble and assessed his pain control. Dr. Alexander testified that Mr. Gamble was transferred to Baptist Hospital on October 21, 2004, and he was no longer involved in his care. Dr. Alexander opined that he complied with the standard of care in his treatment of Mr. Gamble, and that nothing he did contributed to his death. Dr. Alexander also filed a Statement of Undisputed Facts.

Dr. Perra filed a Motion to Dismiss and/or for Summary Judgment, and filed a Statement of Undisputed Facts. Dr. Perra, in her Affidavit, stated that she was familiar with the standard of care for internal medicine in Knoxville, and she first saw Mr. Gamble as a patient on July

¹Worden, in his Motion to Dismiss, had asserted that the Complaint failed to state a claim, because there was no allegations against him contained in the body of the Complaint, even though he was named as a defendant in this action.

26, 2002, and that he already had a DNR in effect when he came to her. She stated that she discussed the DNR with him in August of 2003, after she evaluated him and found him competent to understand, and that he confirmed his wishes, so she continued to list this instruction on his record. She concluded by stating that she had always complied with the standard of care.

Hillcrest Medical Nursing Institute, Inc., also filed a Motion for Summary Judgment, along with supporting affidavits.

The Trial Court entered an Order, which stated that a hearing was held on the pending summary judgment motions, and plaintiff filed responses to the defendants' various motions, but filed no affidavits or documentation in support of her responses. The Trial Court then entered an Order and Final Judgment on April 19, 2006, granting summary judgment to all defendants, and dismissed plaintiff's claims, based on the fact that plaintiff failed to file appropriate responses to the motions for summary judgment. The Court attached the hearing transcript to its Order, and the transcript reflects that the Court once again explained to plaintiff that she had to have expert proof to show medical negligence according to the Medical Malpractice Act, and that her failure to provide the same was the reason he had to grant the summary judgment.

Plaintiff has appealed and raises these issues:

1. Whether the Trial Court erred in dismissing Dr. Worden as a defendant?
2. Whether the Trial Court erred in granting summary judgment to the remaining defendants?

The Trial Court entered an Order of Dismissal as to Dr. Worden, which stated that based on a review of the entire record, including the second amendment to the Complaint, the plaintiff failed to state a claim upon which relief could be granted as to Worden. However, plaintiff asserts this was error, due to the fact that Worden was the medical examiner for Baptist Hospice and signed Mr. Gamble's records from Baptist Hospice, which she alleges were falsified or erroneous.

Our standard of review as to the granting of a motion to dismiss is set forth in *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997), wherein the Supreme Court explained:

A Rule 12.02(6), Tenn. R. Civ. P., motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof. Such a motion admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. In considering this appeal from the trial court's grant of the defendant's motion to dismiss, we take all

allegations of fact in the plaintiff's complaint as true, and review the lower courts' legal conclusions *de novo* with no presumption of correctness.

(Citations omitted).

Thus, in this instance we must take all allegations of fact in the Complaint as true, and review the Trial Court's legal conclusion *de novo*, with no presumption of correctness.

A review of the Complaint demonstrates that plaintiff made no allegations against Dr. Worden whatsoever. She explains in her Brief that she is relying on the doctrine of respondeat superior, and the fact that Worden signed off on medical records which she alleged to be falsified and erroneous. The Complaint, however, does not contain any such allegations, and the Trial Court correctly ruled that the Complaint was insufficient to state a claim upon which relief could be granted regarding Dr. Worden. We affirm the Trial Court's dismissal of the action against Worden.

Plaintiff asserts that summary judgment was improperly granted to the remaining defendants, but as our Supreme Court has explained:

The cases construing Tenn.R.Civ.P. 56 make clear that the summary judgment process is designed to provide a quick, inexpensive means of concluding cases, in whole or in part, upon issues as to which there is no genuine dispute regarding material facts. The summary judgment procedure was implemented to enable the courts to pierce the pleadings to determine whether the case justifies the time and expense of a trial. Consequently, a motion for summary judgment goes directly to the merits of the litigation, and a party faced with such a motion may neither ignore it nor treat it lightly. This is particularly true since summary judgment is not a disfavored procedural shortcut but rather an important vehicle for concluding cases that can and should be resolved on legal issues alone.

* * *

Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial. "If he does not so respond, summary judgment ... shall be entered against him."

Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993)(citations omitted).

In this case, defendants moved for summary judgment, and each attached an affidavit

negating the elements of plaintiff's claims², and showing that there was no genuine issue of material fact. The burden then shifted to plaintiff to produce affidavits, depositions, or other materials to show that there was a genuine issue of disputed material fact, which she failed to do.

Plaintiff's claims regarding breach of contract, misrepresentation, etc., did not require expert proof, yet plaintiff failed to file any affidavits (her own or otherwise) showing there was an issue regarding these claims. As this Court has previously stated:

It is now commonplace for defendants in medical malpractice cases to file motions for summary judgment to test the strength of their adversary's case. These motions are generally supported by the defendant's own affidavit stating that, in their professional opinion, their actions neither violated the applicable standard of professional practice nor caused the complained-of injury. Affidavits of this sort effectively negate the allegations of negligence in the plaintiff's complaint and force the plaintiff to demonstrate the existence of a genuine, material factual dispute that warrants a trial.

Plaintiffs confronted by these summary judgment motions have several options. Frequently, since most of these motions are filed before much discovery has occurred, the only practical option is to file an expert affidavit contradicting the assertions in the defendant's affidavit. Plaintiffs who are unable to produce their own opposing expert affidavit face almost certain dismissal of their complaint because the defendant has effectively negated an essential element of their case. Without an opposing expert affidavit, the plaintiff cannot demonstrate the existence of a genuine factual dispute regarding whether the defendant breached the applicable standard of professional practice.

Hessmer v. Miranda, 138 S.W.3d 241, 244 (Tenn. Ct. App. 2003)(citations omitted).

Plaintiff failed to file an affidavit from an expert to establish a genuine issue of material fact regarding her claims of malpractice, and she failed to file any affidavits to establish a genuine issue for trial regarding her other conclusory claims.

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Carolyn Jean Gamble.

² The only claim which plaintiff made in her Complaint that was not addressed was her claim that Baptist Hospice billed her insurance incorrectly for daily care, when they only came to her home 2-3 days per week. This was not addressed by Townsend's Affidavit, but it was also not brought up again by the plaintiff either in the trial court nor this Court. This specific claim was never addressed by the trial court, but plaintiff also did not raise it as an issue on appeal. Thus, plaintiff waived this issue on appeal.

HERSCHEL PICKENS FRANKS, P.J.